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Supreme Court of the United States

October Term, 1939.

No. 342.

AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Petitioner,

against

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

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The Hecla Press : : New York City

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

Statement.

This matter comes before this Court on a petition to review an order of the United States Circuit Court of Appeals for the Second Circuit, denying Petitioner's motion to punish Respondents for contempt, on the ground that Petitioner has no standing in court to ask for such relief. The only opinion written by the court below was a memorandum reading as follows:

> "Motion denied on ground that moving party has no standing to press a charge of civil contempt, if contempt has been committed. Under the National

Labor Relations Act the Board is the proper party to apply to the court for an order of enforcement and to present to the court charges that the court's order has not been obeyed."

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 938; (U. S. C. Tit. 28, Sec. 347(a)), and Sec. 10(e) of the National Labor Relations Act of July 5, 1935, c. 372, Sec. 10, 49 Stat. 453 (U. S. C. Tit. 29, Sec. 160(e)). The writ of certiorari was granted by this Court on October 16, 1939.

Statute Involved.

The statute involved is the National Labor Relations Act (hereinafter sometimes referred to as "the Act"). The particular provisions of the Act which come into consideration on this appeal are Sections 1, 7, 8, 9 and 10.

Question Presented.

The sole question presented is:

Is the National Labor Relations Board the sole agency which may, under the provisions of the National Labor Relations Act, move to punish as for a contempt of court a person violating an order made by the National Labor Relations Board, after the same had been confirmed by the Circuit Court of Appeals; and has a person or body aggrieved by such violation no right to pray the Circuit Court of Appeals for relief by punishing the violator for a contempt of court?

Nature and History of the Case.

The petitioner, Amalgamated Utility Workers, (formerly known as United Electrical and Radio Workers of America,) is a labor union affiliated with the Congress of Industrial Organizations (C.I.O.). Prior to May 10, 1937, Petitioner (under its former name) filed with the National Labor Relations Board certain charges against Consolidated Edison Company of New York and its affiliates, the respondents herein, to the effect that the said companies had engaged in certain unfair labor practices affecting commerce within the meaning of the National Labor Relations Act, against their employees, being members of Petitioner; and also that the said companies violated the provisions of the National Labor Relations Act by discouraging membership in the Petitioner. Thereupon, and by reason of the filing of the said charges, the National Labor Relations Board, on or about May 10, 1937, issued a complaint against the respondents; and thereafter and in pursuance to the said complaint, hearings were held thereon which resulted in an order made by the National Labor Relations Board on November 10, 1937, which ordered and directed the respondents to cease and desist from certain practices and to take certain affirmative action.

The "cease and desist" portion of the said order directed Consolidated Edison Company of New York, Inc. and its said Affiliated Companies to—

> *"Cease and desist from:*
>
> a. *Discouraging membership in United Electrical and Radio Workers of America* or any other labor organization of their employees, or encouraging membership in International Brotherhood of Electrical Workers or any other labor organization of their employees, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment because of membership or activity in connection with any such labor organization;

b. Urging, persuading, warning, or coercing their employees to join International Brotherhood of Electrical Workers, or any other labor organization of their employees, or threatening them with discharge if they fail to join any such labor organization;

c. Permitting organizers and collectors of dues for International Brotherhood of Electrical Workers or any other labor organization to engage in activities among their employees in behalf of such labor organizations during working hours or on the respondents' property, unless similar privileges are granted to United Electrical and Radio Workers of America and all other labor organizations of their employees;

d. Permitting their employees who were officials of the Employees' Representation Plans to use the respondents' time, property, and money in behalf of International Brotherhood of Electrical Workers or any other labor organization of their employees;

e. Employing detectives to investigate the activities of their employees in behalf of United Electrical and Radio Workers of America or any other labor organization of their employees or employing any other form or manner of espionage for such purposes;

f. Giving effect to their contracts with the International Brotherhood of Electrical Workers;

g. Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees;

h. In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection."

Thereupon Respondents moved in the United States Circuit Court of Appeals for the Second Circuit to vacate and set aside the said order, and the National Labor Relations Board moved to confirm its order. While the said motions were pending, but before the same were heard, the Petitioner moved for an order permitting it to intervene in the proceed-

ings, and the motion was granted. Petitioner thereupon became a formal party to the said proceeding.[1]

About the time that the Respondents moved in the Circuit Court of Appeals to set aside the order of the National Labor Relations Board, International Brotherhood of Electrical Workers (hereinafter sometimes referred to as I.B.E.W.), a national labor union, and certain "local unions" chartered by it, claiming to be aggrieved parties, filed a separate petition to set aside the said order, substantially on the same grounds as those stated by Respondents in their moving papers.

I.B.E.W. had been named in the charges filed by Petitioner with the National Labor Relations Board, as working in concert with Respondents; and among the unfair labor practices charged against Respondents was a claim that Respondents not only discouraged membership in Petitioner, but that it compelled its employees to become members of I.B.E.W.

During the hearings before the National Labor Relations Board it appeared that for many years prior to the decision of this Court validating the National Labor Relations Act (*N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and cases decided therewith) on April 12, 1937, the Respondents maintained seven company unions for the seven companies constituting the so-called Consolidated Edison system; and that immediately upon the announcement of the said decision, and in pursuance to a prearranged plan between Respondents and I.B.E.W.,—and in order to counteract an

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[1] As a matter of fact, the standing of Petitioner as a *party* in the proceeding was recognized from the very beginning, and so was the standing of its counsel, who participated in the proceedings before the Board. The official decision of the Board containing its order is entitled:

> "In the Matter of Consolidated Edison Company of New York, Inc., and Its Affiliated Companies, * * * *and* United Electrical and Radio Workers of America, affiliated with the Committee for Industrial Organization."

And the listing of counsel contains the following:

> "Mr. Louis B. Boudin and Mr. Sidney Elliott Cohn, of New York City, for the United" (4 N. L. R. B. 71).

organization campaign which had been carried on for some time prior thereto among Consolidated's employees,—Respondents started a drive of its employees *into* the I.B.E.W. And that this drive resulted in the transformation of the seven company unions into seven alleged "locals" of the I.B.E.W.; and the execution of so-called collective bargaining agreements between the Respondents and the said company unions, rechristened "local unions" of I.B.E.W., *during the pendency of the proceedings before the National Labor Relations Board.* It is these contracts that were intended to be reached by paragraph "f" of the Board's order quoted above.

The two proceedings,—the proceeding on the petition of the Respondents and the proceeding on the petition of I.B.E.W. and its affiliates, (both to set aside the order of the Board) were consolidated by an order of the Circuit Court of Appeals. (See, Record on Appeal, *Consolidated Edison Co., et al.* v. *N.L.R.B.*; pp. 1736-1737).

The matter came to be heard before the Circuit Court of Appeals on the two petitions as thus consolidated, and upon such hearing the Petitioner appeared by its counsel, Louis B. Boudin, Esq., who argued orally and filed a brief in support of the Board's order. The proceedings in the Circuit Court of Appeals resulted in an order of that Court confirming the order of the Board. The decision of the Court of Appeals is reported in 95 Fed. (2d) at page 390.

Thereafter, Respondents applied to this Court for a *writ of certiorari* to review the decision of the Circuit Court of Appeals, and I.B.E.W. and its affiliates similarly applied for such writ. On the applications for these writs Petitioner, through its counsel, filed a brief in opposition to the application. The applications were granted by this Court, and the appeals were thereupon argued in this Court. Upon the argument in this Court, Petitioner again appeared by its counsel, Louis B. Boudin, Esq., who argued the cause orally and also filed a brief on behalf of Petitioner.

This Court modified the decree of the Circuit Court of Appeals by eliminating therefrom paragraph "f" quoted above, and as so modified affirmed the decree of the Circuit

Court of Appeals. The decision of this Court is reported in 305 U. S., 197. Thereupon, this Court sent its mandate to the Circuit Court of Appeals in accordance with its decision, and the Circuit Court of Appeals, upon receiving the mandate of this Court, modified its decree in accordance with the opinion of this Court. The last mentioned decree of the Circuit Court of Appeals was made on or about March 21, 1939.

Thereafter, Petitioner, claiming that Respondents violated the decree of the Circuit Court of Appeals, entered upon the mandate of this Court, filed a petition in that Court praying that Respondents be punished as for a contempt of court. The petition was dated May 10, 1939, and is printed at pages 4-13 of the Record.

Because the decree of the court claimed to have been violated was captioned in both of the cases in the Circuit Court of Appeals, consolidated as above stated, the petition to punish for contempt was similarly captioned, and notice was given to all the parties to both cases (R. 3-4).

When the motion came to be heard, Respondents as well as I.B.E.W. and affiliates, appeared and moved to dismiss the proceeding upon certain grounds stated in notices of motion previously served by them, which grounds were substantially alike. *Both of those motions were denied by the Circuit Court of Appeals, and no application for review of that decision has been made to this Court and none granted by this Court.*[2]

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[2] It was because of this as well as because of the fact that, as will be seen further below, the order sought to be reviewed was entered only in the Consolidated Case and did not follow the joint caption of the decree, that we did not print in the Record the notice of motion of the I.B.E.W. which is printed in "Suggestion of a Diminution of the Record and Petition for Order for Its Correction." The order sought to be reviewed having been entered in the case to which I.B.E.W. was not a party, we could not see how any paper filed by it would have any relevancy, particularly since it did not raise any separate issue. And if a separate issue had been raised by I.B.E.W.'s motion to dismiss, we assumed that a review of the decision upon such issue could only be had by a separate application to this Court for *certiorari* to review.

Petitioner's application to punish was based not only on the petition printed in the record, but also upon voluminous affidavits which accompanied the petition and substantiated the charges therein contained. Respondents herein interposed an answer to the petition and also filed voluminous affidavits in support of its allegations.

I.B.E.W. and affiliates neither answered nor filed any affidavits in opposition.

Petitioner's application was argued in the court below on the merits, but after the argument the court made the order now sought to be reviewed, which disposed of the motion on the sole ground that Petitioner has no standing in court, without passing upon the merits of the application.

By stipulation between counsel for Petitioner and counsel for Respondents, it was agreed that none of the affidavits on either side, (except the affidavit of Floyd R. Carlisle),[3] should be certified to this Court or printed in the record. It was also stipulated—

> "That the petitioner for certiorari intends to bring up for review, and to rely upon; only the question as to whether or not the movant Amalgamated Utility

[3] As stated in the text, both sides submitted voluminous affidavits bearing on the merits, but since the merits are not involved on this appeal, it would have been a useless expense and waste of time to have all of those affidavits certified and printed,—aside from the fact that it would have brought before this Court an unnecessarily bulky record. We therefore asked counsel for the Respondents to consent to the omission of the certification and printing of *all* affidavits,—limiting the record to the formal petition and answer, so as to bring before this Court the *issues* raised in the court below. But counsel for Respondents refused to sign such stipulation unless we made an exception of Mr. Carlisle's affidavit and printed it in the record. This, notwithstanding the former stipulation that nothing but the standing of Petitioner in court would be brought up for review. We submitted to this exaction, rather than print the voluminous affidavits and have recourse to the rather disagreeable remedy under Subdivision 8 of Rule 38 of the Rules of this Court.

Workers has standing to make and maintain its said motion, which was denied by the United States Circuit Court of Appeals for the Second Circuit" (R. 2).

It was also stipulated that upon the hearing of the application for certiorari as well as upon any hearing before this Court, if certiorari be granted, either side may submit to this Court or refer to any of the other papers filed by either party in the Circuit Court of Appeals (R. 3).[4]

The order of the Circuit Court of Appeals sought to be reviewed (entered by the Court without the knowledge of Petitioner) was entitled in the Consolidated Edison case only, and not in both original proceedings, consolidated as above stated, which was the form followed by Petitioner in its application.

POINT I.

Petitioner was entitled, on general principles of law, to move to punish Respondents for contempt in the event of a disobedience of the decree secured by it.

We respectfully submit, that, unless there is something specific in or about the Act here under consideration which deprives the Petitioner of such right, the Petitioner was entitled, on general principles of law, to move the Circuit Court of Appeals to punish the Respondents for contempt of court, in the event of a failure of the Respondents to comply with the terms of the decree secured by it.

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[4] Since it was expressly stipulated that only Petitioner's standing in court should be brought up for review, the provisions of the stipulation with reference to either side referring to papers dealing with the merits has, of course, no sense. But, as stated under Footnote 3, we had no choice in the matter, and had to take what was given us, unless we were ready to take the alternative course of printing all the affidavits and resort for relief to the provisions of Subdivision 8 of Rule 38 of the Rules.

We need not discuss here the academic question whether or not such a right is general,—in the sense that Petitioner would have a right to apply to the court to enforce that decree in matters not affecting it directly. There is room for the argument that a person securing a decree in equity which also affects other persons or groups, may not ask the court granting the decree to punish, as for a contempt of court, a violation of such portions of the decree as affect only such other persons or groups. But the argument against such right, we take it, would be based on the fact that the person asking the court for relief is not an aggrieved or injured party; and that relief would be denied in such a case on the general principle that only an aggrieved or injured party has standing in court, no matter how important the question involved.

Massachusetts v. *Mellon*, 262 U. S. 447.

But where a party who has secured a decree of court is actually injured or aggrieved by a failure to comply with, or a violation of, its provisions, it would seem beyond question that such party has standing in court to move for the enforcement of the decree by way of punishment for contempt of court. And it would be odd, and a *unicum* in our law, if a person having secured a decree of court for the protection of his rights were denied the right to seek its enforcement. It would be odd, to say the least, if Martin A. Wersing and the others whose reinstatement with back pay was ordered by the decree herein (R. 7) could not ask the court for the enforcement of the portion of the decree affecting them, in case of violation; and that their reinstatement or back pay would depend on the discretion of the National Labor Relations Board as to whether or not it cared to have the Respondents punished for such violation. We respectfully submit that it would be contrary to all our preconceptions of legal right, derived from the general principles of our legal system, that the rights thus settled by a decree of court should depend for their ultimate enforcement on the discretionary power of an administrative agency *which no longer has jurisdiction of the subject.*

And that, even though Martin A. Wersing and the other employees individually named in the decree were not parties to it in the same sense as was Petitioner. The general principles of equity jurisprudence, which transcend the old forms of the common law, would find a way of enforcing this portion of the decree, despite the indifference of either the National Labor Relations Board or the Petitioner, upon the application of the individuals directly concerned,—and we have no doubt that the way would be the punishment for contempt, upon the Court being apprised of the violation.

A fortiori, can there be no doubt of the right of Petitioner, a formal party to the proceeding, from its inception to its culmination in the decree violated by the Respondents, to come to the court which has made the decree settling its rights, petitioning for the punishment of a violation of those rights.

We need not go here into the abstract question whether Congress could, by specific provision in the Act creating the right upon which the decree herein is based, ordain that the enforcement of that right should depend, either in the first instance or at all times, upon the discretion of the National Labor Relations Board. The fact is that there is no such specific provision in the Act. And the point we are making here is, that in the absence of such specific provision it is contrary to well-established principles of our law to so interpret the Act. Not that we believe that the Act is, in fact, silent on the subject: As the discussion further below will show, it is our contention that the Act provides, at least by necessary implication, for the mode of procedure adopted by Petitioner. But it is our claim here that even if there were nothing in the Act to indicate that Petitioner has standing in court to enforce its rights as embodied in the decree rendered by the Circuit Court of Appeals and affirmed by this Court, such standing would be vouchsafed to it by the general principles underlying our legal system.

"No Right Without a Remedy," is the fundamental principle of equity jurisprudence. And we respectfully submit, that a remedy which lies *wholly in the discretion* of an administrative agency is not a remedy.

POINT II.

The National Labor Relations Act creates rights, and is therefore utterly unlike the Federal Trade Commission Act.

It is much to be regretted that the Court below did not see fit to write an opinion stating the legal theory upon which its decision was based. In the absence of such opinion we must assume that the argument of counsel on the other side made below and again in this Court in opposition to the application for the *writ of certiorari,* was adopted by the Court below. That argument is, that the National Labor Relations Act is similar to the Federal Trade Commission Act, and that the procedure under the former Act must, therefore, be assimilated to the procedure under the latter Act. It is then argued further that under decisions of this Court a person aggrieved by a practice as to which the Federal Trade Commission obtained a cease and desist order, has no independent standing in court to complain of the continuance of that practice. We shall see further below that the law involved in practices prohibited by the Federal Trade Commission Act, in so far as they affect private rights, is utterly misapprehended by those who make this contention. But at this point we respectfully submit that even if the law applicable to the subject matter covered by the Federal Trade Commission Act were as assumed by counsel on the other side, that would have no relevancy whatever to our case, since our Act is utterly different from the Federal Trade Commission Act.

A. The National Labor Relations Act and the Federal Trade Commission Act Contrasted.

We respectfully submit that a comparison of the National Labor Relations Act with the Federal Trade Commission Act will prove conclusively that the two acts are as unlike as any two acts of Congress could possibly be.

The character of an Act of Congress is determined by the evil which it was designed to remedy, and, of course, its express provisions. And in interpreting a particular provision, in a doubtful case, the character of the Act, as gleaned from *all* of its provisions, as well as the nature of the evil which it was intended to remedy, must be taken into consideration. And, we respectfully submit, that an examination of the Labor Relations Act under both aspects leads to the conclusion that the Act was designed *to confer rights upon individuals and associations;* and that the protection of those rights was not meant to be left entirely to the National Labor Relations Board. When the National Labor Relations Board has acted,—a violation of the rights thereby secured established, and the remedy therefor prescribed,—those whose rights have been found to have been invaded and for whose benefit the remedies have been prescribed, have rights which they may assert in court *in propria persona,* and without the intervention of the National Labor Relations Board.

This Act is, therefore, utterly unlike the Federal Trade Commission Act, which deals entirely with frauds upon the public at large,—and is therefore different both with respect to the nature of the evil sought to be remedied and with respect to the method applied to its eradication. The Federal Trade Commission Act, dealing as it does with frauds upon the public at large, is essentially penal in its character. What is important to remember in this connection is that notwithstanding the fact that the Federal Trade Commission Act seeks to prevent unfair methods of competition, it is not intended for the protection of the individuals or groups who are affected by those practices as *competitors,* but the rights of the public at large as *consumers.* On the other hand, our statute, while *motivated* by the injury resulting to the public at large from the prevalence of unfair labor practices, deals with and is designed to prevent practices which primarily affect special groups and individuals. An unfair labor practice does not consist in doing something to employees generally, but in acts affecting *particular employees* because they have attempted to organize themselves into *a*

particular organization. Or, in another class of cases, the unfair labor practice consists in injury to such a *particular organization* by discouraging membership therein. Its character is, therefore, exactly like that of the Interstate Commerce Act, which was designed to prevent certain industrial practices which Congress had found to exist, and which, in its opinion, put it in the power of those controlling industrial processes to favor certain groups or individuals as against others,—to the direct injury of the latter, and the resulting injury to the public.

That it is the injury to these individuals and groups with which our legislation is primarily concerned, is evident upon bare inspection of the Act. In fact, upon careful consideration, it will be found that the National Labor Relations Act emphasizes more strongly the private aspect of the evil with which it deals than does the Interstate Commerce Act. And this must be borne in mind when construing the remedial provisions of our Act.

In this connection it must be remembered that the right of Congress to legislate at all on our subject is due, not, as in the case of the Interstate Commerce Act, to a constitutional grant of power to legislate directly on the subject; but rather because of the effects upon commerce of the actions of the groups and individuals who are injuriously affected by the industrial practices sought to be prevented. Concededly, Congress has no power to legislate on the relation of master and servant, purely and exclusively as such, when the same relates to production only. If the matter were to be considered from that angle exclusively, Congress had no right to legislate on the labor relations of any of the employers involved in the cases decided by this Court under the National Labor Relations Act commencing with the *Jones and Laughlin* Case. The right of Congress to legislate on the subject is due entirely to the fact that the *private grievances* of certain individuals and groups in a matter in itself not subject to federal regulation has been found to habitually lead to certain *action on the part of those individuals and groups*,—namely, *strikes*,—which made their *private griev-*

ances a matter of public and federal concern within the meaning of the Constitution. In this respect the National Labor Relations Act differs from the Interstate Commerce Act, which deals with a subject matter directly within the power of the Federal Government. The *private aspect* of the problem is, therefore, much more pronounced in the National Labor Relations Act than in the Interstate Commerce Act. In construing our Act, that aspect of the situation must be borne in mind,—and whenever there is any doubt at all, the Act must be construed with a view to the private grievances which Congress has found must result in certain acts on the part of those aggrieved, and provide *ample opportunity for the protection of the rights secured by the Act upon the motion of the parties aggrieved*, to the end that the Act may achieve the purposes and have the beneficial effects which Congress had in mind.

Nor is this an invitation to the Court to speculate upon the purposes or intentions of Congress. Those purposes and intentions are clearly and expressly stated in the Act itself. The very first words of the Act show that the Act deals with private rights, and the entire statement of policy contained in Section 1 of the Act is an elaboration of the purpose of the Act to protect those private rights, because of the injurious effects which a denial of those rights has been found to have upon commerce. The opening statement of the policy of the Act is as follows:

> "The denial by employers of *the right of employees* to organize and the refusal by employers to accept the procedure of collective bargaining *lead to strikes and other forms of industrial strife or unrest*, which have the intent or the necessary effect of burdening or obstructing commerce."

And after elaborating on the thesis thus stated, the Act proceeds to say—

> "Experience has proved that protection by law of *the right of employees* to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce."

And after elaborating the second thesis, the Act concludes the statement of policy as follows:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by *protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing,* for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

All of which is in marked contrast to the nature and design of the Federal Trade Commission Act.

To begin with, the Federal Trade Commission Act, both in its history and design, is part of, or at least related to, our anti-trust legislation, which is designed to protect the public at large. The anti-trust laws are primarily penal statutes, notwithstanding the fact that they also provide for civil remedies. It is because of this general character of the Federal Trade Commission Act that it was made part of Title 15 of the United States Code, and placed immediately following the anti-trust acts.[5]

Turning from the place of the Federal Trade Commission Act in our law to its content, we find that it is also primarily a penal statute, designed to protect the public against evil practices calculated to injure the public at large. And the Federal Trade Commission is, primarily, a public agency to protect the public against these evil practices. *Both, the statute and the Commission created thereby, deal with Public Wrongs.* This is well summarized in the heading to Section 5 of the Act (U. S. Code, Title 15, Sec. 45) which is—

> *"Unfair methods of competition unlawful;* prevention by Commission."

---

[5] The National Labor Relations Act, on the other hand, is Chapter VII of Title 29, which deals with labor and its rights.

And this is emphasized by the two opening sentences of that section which are as follows:

> *"Unfair methods of competition in commerce are declared unlawful.*
>
> "The Commission is empowered *and directed* to prevent persons, partnerships, or corporations, except banks and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

The Federal Trade Commission is, in fact, a prosecuting agency, set up by the Federal Government to prevent injuries to the public by the prosecution of those who engage in the practices declared unlawful by the Act creating it. *"Unlawful"* is the keynote of the Federal Trade Commission Act, and prosecution of wrongdoers is the business of the Federal Trade Commission.

Needless to say, this is poles apart from the nature and design of the National Labor Relations Act and the functions of the National Labor Relations Board. Nothing is declared "unlawful" by the National Labor Relations Act; nor any *penalties* imposed by it. Unlike unfair trade practices, which are declared "unlawful" by the Federal Trade Commission Act, unfair labor practices are not "unlawful",—*they are merly infringements of the private rights created by the Act.*

B. The National Labor Relations Act Creates Private Rights.

Turning now from a consideration of the general objects and purposes of the National Labor Relations Act,—which we have found to be in striking contrast to those of the Federal Trade Commission Act,—to the consideration of the specific provisions of our Act, we shall find them to deal exclusively with private rights therein defined, and that the administrative agency thereby created is really a court of first instance wherein those rights may be asserted and litigated. We shall have to return to this subject again, and shall, therefore, not pursue this point any further here. For the true nature of the National Labor Relations Board can

only be understood after a careful consideration of the rights with which it is called upon to deal. That those rights are of a private nature seems to us a hardly disputable point, in view of the express provisions of the statute. Section 7 of the National Labor Relations Act (U. S. Code, Title 29, Section 157) reads as follows:

> "*Employees shall have the right* to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

We respectfully submit that in the face of this specific provision of the statute,—*contained in a separate section*, distinct and apart from that in which unfair labor practices are defined,—the nature of the rights created by this Act is hardly arguable. If there may be any argument at all, it is as to the manner in which these rights may be enforced, but not as to their existence. Being placed at a disadvantage of having to spread our argument "all over the lot" by the failure of the Court below to write an opinion, we must anticipate every possible avenue of argument that may be pursued by counsel on the other side. It is with that in view that the following is respectfully submitted:

(a) THE ACT CLEARLY RECOGNIZES THE RIGHTS OF GROUPS, PARTICULARLY THE RIGHTS OF LABOR ORGANIZATIONS.

One possible argument against the standing of the Petitioner in the proceeding initiated by it in the Court below, is, that while private rights are created by the statute, those rights are given to individuals and not to labor organizations. The answer to that is, that while the rights are those of individuals, *their enforcement and exercise* is clearly placed in the hands of labor organizations. Indeed, the purpose of the Act being the encouragement of *collective action*, the statute confers rights even on groups that have no formal organization. We need not inquire here into the question whether or not unorganized groups may have

standing in court, and if so, in what form. Suffice it to say, that the statute recognizes the existence of such groups and confers upon them rights which the employer may not violate. Subsection (a) of Section 9 of the Act provides that, notwithstanding the legality of a so-called closed-shop agreement if entered into under the conditions stated in that subsection, and an agreement entered into for a closed shop in accordance with its provisions, "any individual employee or a *group of employees shall have the right* at any time to present grievances to their employer."

As to labor-organizations, it may be said that the Act bristles with provisions recognizing their existence and protecting their rights. And that is necessarily so: For, although the right of self-organization and collective bargaining is given to individuals, the *exercise* of those rights is, in its very nature, a *collective act of an organization.* The entire purpose of the Act would, therefore, be defeated if these organizations were deprived of the right to assert these rights and enforce them in their collective capacity of organized bodies. In other words, the rights created by the statute here under consideration are not abstract, but *concrete*; and the statute must be construed in a manner to give these rights real substance by permitting the organizations upon whom they are conferred and who are the only ones that can assert them in the first instance, to assert them throughout the existence of the controversy and until they shall have been fully vindicated.

So, Section 8 of the Act not only makes it an unfair labor practice,—

> "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or *discourage membership in any labor organization.*"

but also,—

> "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

In other words, it is not only the individuals who are protected in the full and free exercise of their right to self-organization, but *the organizations created by these individuals are protected against discrimination.* And not only by discrimination which acts upon individuals, but also by discrimination which does not affect individuals but organizations as such, as by discrimination against one organization by giving financial aid to its rival.

And it is to vindicate the very right thus conferred by the Act upon it, and now embodied in a decree *secured by it*, that Petitioner is now knocking at the doors of the courts. For, as already stated, the decree entered by the Circuit Court of Appeals, upon the mandate of this Court, directs the Respondents to—

> *"Cease and desist from:* Discouraging membership in United Electrical and Radio Workers of America."

It is this right, thus embodied in a decree of court, that Petitioner sought to enforce in the Court below by asking the Court to examine its claim that the decree had been violated; and if that claim be found to be correct, to punish its past violation and prevent its violation in the future.

(b) THE POWERS CONFERRED UPON THE NATIONAL LABOR RELATIONS BOARD ARE NOT IN DEROGATION OF THE RIGHTS CONFERRED BY THE NATIONAL LABOR RELATIONS ACT UPON INDIVIDUALS, GROUPS AND ORGANIZATIONS. NOR ARE ITS POWERS EXCLUSIVE, EXCEPT TO DETERMINE, IN THE FIRST INSTANCE, WHETHER AN UNFAIR LABOR PRACTICE HAD BEEN COMMITTED, AND TO PRESCRIBE THE REMEDY THEREFOR.

There is only one other possible argument against the right of Petitioner to enforce the decree already secured by it in the courts, and that is that there is some specific provision of the National Labor Relations Act which militates against it. Needless to say, there is no such specific provision; and those arguing on the other side are therefore reduced to the necessity of arguing from implications. We have already pointed out that whatever implications there

may flow from the nature and design of the Act are clearly in favor of the existence of the right in the Petitioner rather than against it. We may now see what possible arguments are deducible from its specific provisions.

We have already pointed out that unfair labor practices are not made "unlawful" by the National Labor Relations Act. Not being public wrongs, there is certainly no reason why their prevention should be placed in the hands of an administrative agency, except as a forum wherein they may be properly vindicated. That has been done. The litigation already had, had conclusively established by court decree that Respondents had deprived *this Petitioner* of the rights guaranteed to it by law, and *Respondents were ordered and decreed to cease from continuing that violation.* What is there in the Act that prevents the Petitioner from seeking the enforcement of this decree? *Nothing.*

The statement that the Act places the protection of Petitioner's rights as embodied in the decree of court exclusively in the hands of the National Labor Relations Board is merely another way of saying that there is nothing in the Act which specifically gives the Petitioner that right to institute the proceeding. That, we respectfully submit, is not enough.

In fact, we doubt very much whether the National Labor Relations Board has the power to protect the Petitioner's rights by a motion to punish for a *civil* contempt as distinguished from its right to ask the Court to protect its dignity by punishment of the Respondents as for *criminal* contempt. But assuming, for the purpose of this argument, that the National Labor Relations Board has the right to move to punish for civil as well as for criminal contempt, clearly that is no reason why the Petitioner should not have the right to proceed for the redress of its own grievances by a motion to punish for civil contempt,—*the only way in which its own grievances may be properly satisfied.*

And in considering the question whether or not the rights of Petitioner may be left safely in the hands of the National Labor Relations Board, it must be borne in mind that,—again unlike the Federal Trade Commission,—there is no

duty imposed by the Act upon the National Labor Relations Board, except the ordinary duty, imposed upon all courts, to act judicially when it does act. There is nothing in the National Labor Relations Act corresponding to the provision of the Federal Trade Commission Act, which not only *empowers* but *directs* the Commission to prevent unfair trade practices. The reason is not far to seek,—the National Labor Relations Board is not a public *prosecutor*, but a *court*.

C. The National Labor Relations Board is an Industrial Court.

We respectfully submit, that upon careful examination it will be found that the National Labor Relations Board was intended to be an industrial court of first instance.

As already pointed out, the National Labor Relations Act does not define any public wrongs, and does not establish any public prosecuting agency to prosecute wrongdoers. There are no Public Wrongs defined in the Act, and there are therefore no *prosecutions* thereunder. The Act, as its declaration of purpose clearly indicates, was intended to declare industrial rights, and to create a court of first instance in which those rights may be vindicated. Because of the nature of the rights declared, and the litigants involved, it was found necessary to clothe this special court with certain special powers not possessed by ordinary courts; and to create a procedure somewhat different from that of ordinary courts, so that the special class of litigants expected to resort to it may not go without remedy either because of the litigants' want of means to carry on litigation in an ordinary court, or because of the lack of facilities in ordinary courts to investigate the industrial problems involved. For the same reason, and because of the public interest involved, this special court has been clothed with power, having judicially established certain rights to turn Petitioner in the regular courts and move for the enforcement of its judgments. But although great powers have been conferred upon it, it was not made its *duty* to protect either the public at large or any individual or groups against a violation of the rights created

by the Act. No more than a District Court of the United States which is given *power*,—i. e., *jurisdiction*,—to vindicate certain rights, has the duty of becoming a grand jury looking for the punishment of the violators of such rights. The failure to place upon the National Labor Relations Act the *duty* to prevent unfair labor practices, in the same manner as the duty is placed upon the Federal Trade Commission Act to prevent unfair trade practices, was therefore no oversight on the part of Congress. On the contrary: It is part of the congressional intent to make the National Labor Relations Board a court of first instance.

In this connection, we respectfully submit that it is rather odd that the very groups of persons who have in the past vociferously attacked the National Labor Relations Board for acting both as prosecutor and judge, and have sought the enactment of amendments to that Act which would separate those functions, now come before this Court seeking to deprive the real litigants of the opportunity of vindicating their private rights, by asking this Court to give the Act a narrow construction, utterly unwarranted either by its general nature or any of its specific provisions, which would enlarge and emphasize the Board's character of prosecutor.

We shall see further below that more is involved than the mere question as to *what agency* shall enforce the rights created by the National Labor Relations Act. But even if this were purely a question of the choice of agency, we respectfully submit, that, in consonance with our system of law, the real litigants ought to be given the opportunity to independently vindicate their rights.

POINT III.

The National Labor Relations Act not only creates private rights but gives the parties upon whom these rights are conferred status in the courts for their vindication.

The argument thus far has proceeded on the assumption that the National Labor Relations Act is actually devoid of any indication as to the intent of Congress on the subject here under consideration,—in whose keeping the protection of the rights thereby secured should be, in so far as the problem of the right to *move for their protection* is concerned. But such is not, in fact, the case: *The National Labor Relations Act expressly gives the parties upon whom the rights are conferred the right to take whatever steps they deem necessary for their protection, and does not leave their protection solely to the National Labor Relations Board.*

A. The National Labor Relations Act expressly gives private parties the right to move.

We shall see further below that this is quite different from,—in fact, exactly the reverse of,—the provisions of the Federal Trade Commission Act. And also that there were special reasons for making the provisions of these Acts different. At this point, however, we are concerned only with the provisions of our Act as they are, and we shall therefore proceed to examine them.

The first thing to be noted in this connection is the language of Subsection (b) of Section 10 of the Act, dealing with *charges*. The first part of that subsection is as follows:

> "Whenever *it is charged* that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges * * * and containing a notice of hearing before the Board * * *"

Two things are to be noted about this provision: First, that the Board is simply *given power* to issue a complaint and hear the matter. This provision is in effect merely a provision conferring *jurisdiction* upon the Board, similar to provisions conferring jurisdiction upon other courts of the United States. *It is a grant of power to hear and determine.* As already pointed out, no duty is imposed upon the Board to move of its own accord. The second thing to be noted is that the provision clearly contemplates somebody other than the Board making the charges,—*a moving party,* whose charges are to set the Board machinery in action. Whenever *"it is charged"* the Board shall have power to move. This, it may be noted here, is in striking contrast to the provisions of the Federal Trade Commission Act which contemplates the Commission *itself* making charges, as well as the Commission moving of its own accord.[6]

The foregoing clearly shows the Legislator's intent as to the entire scheme or mode of operation of the semi-judicial machinery set up by the Act, and is merely preliminary to the provision which seems to us decisive on the point here under consideration. Those provisions are contained in Subsection (f) of Section 10, which are as follows:

> *"Any person aggrieved* by a final order of the Board granting *or denying* in whole or in part *the relief sought* may obtain a review of such order in any Circuit Court of Appeals * * * by filing in such Court a written petition praying that the order of the Board be modified or set aside."

This subsection not only contemplates *a party seeking relief,* just as Subsection (b) contemplates *a party making charges,* but specifically gives such party standing in court. It in fact puts the party making the charges on exactly the

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[6] The corresponding provisions of Section 5 of the Federal Trade Commission Act (given more fully further below in the text) are as follows:

> *"Whenever the Commission shall have reason to believe* * * * it shall issue * * * a complaint stating *its* charges."

same plane or level as the party against whom the charges are made. This is not merely a provision giving persons *against* whom an order has been made by the Board the right to appeal from such order, but gives a party who was *denied relief* by the Board the right to come to the Circuit Court, not only independently of the Board but *against the Board*, asking the Court to give him the relief which the Board has denied him. Nor must the denial be entire,—it is sufficient that the Board has failed to give a party *all* the relief which he considers himself entitled to, to enable him to ask the Court for relief.

We respectfully submit that there could be no more explicit recognition of the independent right of a party to vindicate his rights in the courts independently of the Board.

And this explicit provision becomes particularly significant when we *contrast* it with the provisions of the Federal Trade Commission Act, with the practice under which, we are told, the procedure under our Act should be *assimilated*. Those provisions not only do not recognize any aggrieved party in the sense of our Act, and, therefore, the decision of the Commission final against such "aggrieved person," but, under the decisions of this Court, *a decision of the Commission in favor of an "aggrieved person" is insufficient to sustain a "cease and desist" order.*

Federal Trade Commission v. *Klesner*, 280 U. S. 19.

B. The respective provisions of the Federal Trade Commission Act and of the National Labor Relations Act are different because of a difference in the prior state of the law in the fields which they, respectively, cover.

We must not conclude, however, from the language of the Federal Trade Commission Act, or from the language of the opinions of this Court interpreting that Act, that the law is disregardful of private rights. On the contrary, as was pointed out in an earlier portion of this brief, the law is particularly careful of private rights, and "No Right Without a Remedy" is a fundamental principle of equity jurisprudence. Therefore, when the Congress has, in the Federal

Trade Commission Act, legislated without consideration for the private rights of persons injuriously affected by unfair trade practices, and this Court has held, in the case just cited, that—

> "Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs."

it was not because either Congress or this Court considered private rights unimportant, or that it would be consistent with the genius of our law to leave the protection of such rights to the absolute discretion of an administrative agency. We respectfully submit, that nothing more contrary to the genius of our law could possibly be suggested. The real reason is not far to seek. Indeed, it is shown in the passage of the opinion of this Court from which we have already quoted,—namely, *that the private party was not without remedy for the redress of his private wrongs.*

It must be borne in mind that long before the Federal Trade Commission Act was adopted any person injured by an unfair trade practice could come into court and obtain relief for the wrong thus inflicted upon him. "Unfair competition" is, indeed, an established branch of our equity jurisprudence. No statute was necessary in order to give relief for private wrongs of this class. Nor was it necessary to create a special forum for the litigation of the private rights involved, or a special agency for their enforcement. It was, therefore, perfectly proper for Congress to deal exclusively with the public wrongs involved, and to create a public agency to take care of the public interest only. By doing so, it did not disregard the private rights involved,—it merely left them in the keeping of the private parties, *who are as free now as they were before the enactment of the Federal Trade Commission Act to enforce them in the courts by private suit.*

And that is all that this Court has said in *Federal Trade Commission* v. *Klesner.* This Court certainly did not say that Sammons, Klesner's competitor, could not come into court

asserting his private rights. All that this Court said was that the Federal Trade Commission Act did not create an administrative remedy for the redress of these private rights, *in addition* to the ordinary remedy given by the equity courts. Nor was Mr. Sammons before this Court urging upon this Court his private rights.[7] The only parties before this Court were the Federal Trade Commission and Klesner. And this Court very properly said that the Federal Trade Commission had no business to interfere in a purely private quarrel which involved no public interest. Said this Court, in the concluding paragraph of its opinion in that case:

> "The undisputed facts, established before the Commission, at the hearings on the complaint showed affirmatively the private character of the controversy. It then became clear (if it was not so earlier) that the proceeding was not one in the interest of the public; and that the resolution authorizing the complaint had been improvidently entered."
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> *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 30.

But when we turn to the question of unfair labor practices, we are in an entirely different legal field. We must start out with the recognition of the fact that not only have private rights been created by Section 7 of the National Labor Relations Act, *but that the National Labor Relations Board was specially created as a forum for the litigation and enforcement of those rights.* The *purpose* of the statute we

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[7] We do not mean to suggest that if Sammons had come to this Court, *in that proceeding*, urging his private rights upon this Court, the decision of this Court would have been different. But he was not before this Court because he was not, and had no right to be, in the Court of Appeals of the District of Columbia, which rendered the decision under review in the *Klesner* case. And he had no right to be heard in *that* court because the Federal Trade Commission Act, dealing exclusively with public wrongs, did not give him that right.

are dealing with its therefore exactly the reverse from the statute involved in the *Klesner* case. It is, therefore, utterly absurd to say that the administrative agency in question was not created for the purpose of enforcing private rights. *If that were true the National Labor Relations Board would have no more right to move for the punishment of Respondents than has Petitioner.* For the question in the *Klesner* case was not, *who* may move for the enforcement of the private rights there involved, *but whether those rights may be enforced at all.* The real meaning of the decision of this Court in the *Klesner* case, as we read it, is that the Federal Trade Commission had no right to enforce Mr. Sammons' private rights,—that that must be left to Mr. Sammons himself by means of the usual action in a court of equity.

But there is no other way in which Petitioner, or the other parties whose grievances were adjudicated and a remedy provided for in the decree in question, can come into court seeking the enforcement of those adjudicated rights except by means of a proceeding to punish the offenders for contempt of court. Concededly, no separate action could have been brought to enforce those rights in the first instance. Resort must be had, in the first instance, to the administrative proceeding provided by the Act. And if the interpretation placed upon the Act in the court below be correct, no independent proceeding may now be brought in a court of equity for the enforcement of the rights secured by the decree of court which was the result of the invocation of the administrative remedy. If, therefore, the interpretation of the Act contended for by Respondents and embodied in the order appealed from be correct, we arrive at the utterly absurd conclusion that by assimilating the practice under the Labor Relations Act to the practice under the Federal Trade Commission Act, a "public agency," which this Court has said in the *Klesner* case has no right to seek the enforcement of private rights, is the only agency which may seek the enforcement of the private rights created by our Act.

But far more important than the absurdity involved, is the great injustice to the parties which is involved in that conclusion. For, unlike the complainant in the *Klesner* case, Petitioner has no other forum to which it may resort for the enforcement of its rights.

In answer to this we are told that the National Labor Relations Board is there to take care of our private rights. Aside from the fact that this is contrary to the decision of this Court construing the statute with the procedure under which our Act is to be assimilated, we are stared in the face with the statement of this Court in the case under that Act *that the discretion of the Board is final.* And in order that there may be no mistake about it, and that the Respondents' position actually is that the enforcement of our rights depends upon the *absolute discretion* of the Board, one set of counsel opposing our application for certiorari, said in their brief that, upon their interpretation of our Act,—

> "* * * the individual or union upon whose complaint the Board acted by instituting the proceeding, *has not the slightest right to require the Board to apply to the Court* for the enforcement of its Order."
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> (Brief submitted by Messrs. Lobe Straus and Claude A. Hope, p. 15.)

This, from counsel who were particularly insistent in urging upon this Court in the earlier stages of this litigation *the peculiar sanctity of private rights.*

POINT IV.

The provisions of the National Labor Relations Act and those of the Federal Trade Commission Act further contrasted, and the law of unfair competition and that of unfair labor practices considered.

It would seem to us that in view of the express provisions of the Act giving parties seeking relief against unfair labor practices, standing in court for the purpose of obtaining

that relief, independently of, and even in despite of contrary action by, the Board, it is hardly arguable that such parties have no standing in court to enforce a decree actually obtained by them. But in view of the fact that the court below thought it proper to assimilate the procedure under the National Labor Relations Act to that under the Federal Trade Commission Act, as if the Acts were *similar*, we deem it proper to examine further into the provisions of the latter Act. And, we respectfully submit, that such examination will show that, far from being similar, the provisions of the two Acts are in striking *contrast* to each other.

We have seen that the provisions of our Act contemplated a moving party outside of the Board itself, upon whose charges the Board is to act and sit in judgment; while the Federal Trade Commission Act does not contemplate any complainant moving the Board to action by his charges of unfair trade competition, and that the Board itself is to act upon its own charges. But a close examination of the wording of the decisive portion of the Federal Trade Commission Act will show that it expressly excludes private parties and their rights from consideration as a moving cause for the action of the Commission, *and expressly limits it to a consideration of the public interest.* And this Court has expressly held that the protection of the private rights is not in itself sufficient to create a "public interest."

The portion of Section 5 of the Federal Trade Commission Act (U. S. Code, Title 15, Sec. 45) dealing with the procedure of the Commission reads as follows:

> "Whenever the Commission shall have reason to believe that any such person * * * has been or is using any unfair method of competition in commerce, and *if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public,* it shall issue and serve upon such person * * * a complaint stating *its charges* in that respect, and containing a notice of a hearing."

In other words, the only consideration upon which the Commission may act under the express provisions of this statute *is the public interest*, and it is its determination upon that subject that is decisive. Two more dissimilar statutes than the one just quoted and our own Act can hardly be imagined. And it is because of this specific provision of the statute that this Court has held, in the case relied upon by Respondents, both below and in their brief in opposition for the application for a *writ of certiorari*, that the Board cannot be moved into action by the injury to a private party.

Federal Trade Commission v. *Klesner*, 280 U. S. 19.

That the decision of this Court in the case just cited was based entirely on the particular wording of the statute just quoted is clear from the opinion of this Court in that case. In that opinion, delivered by Mr. Justice Brandeis for a unanimous court, this Court said:

> "The provisions in the Federal Trade Commission Act concerning unfair competition are often compared with those of the interstate commerce act dealing with unjust discrimination. But in their bearing upon private rights, they are wholly dissimilar. The latter act imposes upon the carrier many duties; *and if creates in the individual corresponding rights* * * *"
>
> "While the Federal Trade Commission exercises under Section 5 the functions of both prosecutor and judge, the scope of its authority is strictly limited. A complaint may be filed only 'if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public.' This requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived—the evidence commonly adduced by the plaintiff in 'passing off' cases in order to establish the alleged private wrong * * * But to justify the commission in filing a complaint under Section 5 of the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. *Public interest may exist although the practice deemed unfair does not violate any private right* * * *

"In determining whether the proposed proceeding will be in the public interest the commission exercises a broad discretion."

Federal Trade Commission v. *Klesner*, 280 U. S. 19, 26-28.

The purpose of the statute being the protection of the public at large, the discretion of the Commission as to whether or not the public interest requires the suppression of a particular unfair trade practice is, as pointed out by the Court in an earlier portion of the same opinion, final.

No person whose private rights have been injured by the alleged unfair trade practice has any standing in court to complain of such decision, because his interests could never have been considered in arriving at the decision. On the other hand, no right of his has been affected, since an adverse decision of the Board does not affect his right to come to court and obtain relief in a private suit.

POINT V.

No enabling act is necessary to permit a party to assert his statutory rights, and such a right may be asserted in ways other than those contemplated by the legislator.

We respectfully submit that no special grant of power by way of an enabling provision is necessary in order that a party may assert his statutory rights in our courts. This is true of our Federal courts as well as of our State courts. There is a difference between the Federal courts and the State courts with respect to *the power of the court* to entertain suits,—our inferior Federal courts being of limited jurisdiction and have only such jurisdiction as is granted to them by Congress. But we know of no distinction between the State and Federal courts with respect to the right of a person to assert his rights, whether general or statutory, in those courts which have jurisdiction of the subject matter. In the nature of the case this question arises but seldom.

But it so happens that this Court has had occasion to pass on this problem in connection with the very rights here asserted, in two notable recent decisions, which we believe conclusively establish our contention.

Texas & N. O. R. Co. v. *Brotherhood,* 281 U. S. 548; *Virginia Ry. Co.* v. *System Federation,* 300 U. S. 515.

Nor is a party limited in the assertion of his statutory rights to the modes contemplated by the Legislature. We do not mean to say, of course, that where the Legislature has, in the act conferring the right, limited its enforcement to a particular forum, thereby specially created for the enforcement or the litigation of such right, the right may be enforced *contrary* to the provisions of the statute. What we say is, that in the absence of any special provision giving a particular agency or court exclusive jurisdiction, the right may be enforced otherwise than provided by the Legislature. And that, even when the problem was in contemplation of the Legislature at the time of the shaping of the statute, and the mode in which it is now sought to enforce it discarded or rejected for reasons which would make the given mode of enforcement not *contrary* to the express intention of the Legislature.

Perhaps the best example of such a situation is that which was presented to this Court in connection with the Sherman Anti-Trust Act, when an attempt was made to assert the rights or protection thereby granted in a State court. The Sherman Act does not grant any private rights except under Section 7, which gives the injured party the right to sue in a Federal Court for triple damages. It is elementary, of course, that that action can only be brought in the Federal courts. And this Court has held that under that Act, prior to its amendment by the Clayton Act, no other action could be brought by a private party in the Federal courts.

Minnesota v. *Northern Securities Co.,* 194 U. S. 48.

And an examination of the debates in the United States Senate at the time when the Sherman Act was being shaped in that body, discloses the fact that an attempt was made to amend the Act by providing that an action thereunder could be brought by a private party in the State courts, and that that amendment was rejected.

Nevertheless, this Court has held that the rights given by the Sherman Act to private parties have an existence independent of the special provisions of the Act as to rights of action, and may therefore be asserted in the State courts.

E. Bement & Sons v. *National Harrow Co.*, 186 U. S. 70.

POINT VI.

Certain Statutes Distinguished.

In their brief in opposition to the application for *certiorari* counsel for the Respondents said:

> "If the Congress had intended to confer upon private individuals the right to institute proceedings in Court for any purpose other than review when aggrieved, it would have made express provision therefor, as it did in the following Acts"—

listing four Acts of Congress. We respectfully submit that the assertion is utterly unwarranted,—is, indeed, contrary not only to elementary legal principles, but to the usual practice of Congress; and that an examination of the statutes referred to will show that there were special reasons in each case necessitating special provisions with respect to private rights. An examination of those statutes will show that the provisions therein contained with respect to private rights were not mere grants of right to go to court, but provisions giving special remedies, or choices of remedies, or limitations in connection with a choice of remedies. In other words, these special cases but prove the general rule that no special grant is needed for the enforcement of a statutory right in the ordinary ways known to the law.

A. The Interstate Commerce Act.

The first of the Acts thus referred to, in point of time of enactment, is the Interstate Commerce Act; and the special section to which we are referred is Section 9 of that Act. The section in question provides as follows:

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any District Court of the United States of competent jurisdiction; *but such person or persons shall not have the right to pursue both of said remedies,* and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."
>
> Interstate Commerce Act (U. S. Code, Title 49). Sec. 9.

It is clear that the reason for the provision is not that without it private parties could not sue for the protection of their rights. It is obvious that the provision became necessary by two special circumstances: Shippers having been given the right to present their claims for adjudication by the special agency created by the Act, it became necessary to state that that was not a substitute but *an additional* remedy. And, having provided two remedies, it became necessary to state whether they were *concurrent* remedies or merely *a choice* of remedies.

B. The Shipping Board Act.

The next Act in point of time of enactment is the Shipping Board Act. The provisions relating to the enforcement of orders of the Shipping Board or suits thereon in case of an award of damages are too voluminous to reproduce here. But an examination of these provisions, we respectfully submit, clearly show that the reason for the provisions is their special character, and not the supposed necessity for a spe-

cial grant of power to apply to the courts for the protection of one's rights, or the fear of Congress that if no specific provision were made the courts would not enforce the rights of private parties on their own application or suit.

U. S. Code, Title 46, Secs. 828, 829.

C. The Packers and Stockyards Act.

The next Act we are referred to is the Packers and Stockyards Act, and the sections of the Act cited are 308 and 309. The first of these sections reads as follows:

> *"Liability to individuals for violations; enforcement generally.* (a) If any stockyard owner, market agency, or dealer violates any of the provisions of sections 205, 206, 207, or 208 of this chapter, or of any order of the Secretary made under sections 201 to 217 inclusive of this chapter, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.
>
> "(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 210 of this chapter, or (2) by suit in any district court of the United States of competent jurisdiction; *but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."*

U. S. Code, Title 7, Sec. 209.

The other section referred to is too voluminous to be reproduced here in full, and it is clear that none but its last subdivision could have been in mind of learned counsel for the Respondents. That subdivision reads as follows:

> "If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides

or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit."

U. S. Code, Title 7, Sec. 210, Subd. (f).

Here, again, it is clear that the reason for inserting the provisions is their special nature, which includes a large choice of remedies as well as a special statute of limitations,—and not the fear of Congress that unless a special grant to enforce the rights given by this Act were contained in the Act the courts would refuse to enforce the Act at the instance of the parties upon whom the rights are conferred.

D. The Fair Labor Standards Act.

The fourth Act which we are referred to is the Fair Labor Standards Act of 1938, and the section of the Act cited is Section 16(a). This is clearly a printer's error, and the subdivision which counsel must have had in mind is Subdivision (b), which reads as follows:

"Any employer who violates the provisions of section 206 or section 207 of this charter shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, *and in an additional equal amount as liquidated damages.* Action to recover such liability may be maintained in any court of competent jurisdiction *by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such*

employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow *a reasonable attorney's fee to be paid by the defendant, and costs of the action.*" (Italics ours.)

U. S. Code, Title 29, Sec. 216(b).

Here, again, it is clear that it is the special nature of the provisions that made their insertion necessary, and not the fear or opinion of Congress that unless special provision were made therefor the courts would not enforce the rights granted by that Act *in the ordinary way and manner,* in accordance with established legal practice and procedure.

POINT VII.

The position of the Board, its powers, and the problem of policy.

In pursuance to our policy to give notice to all the parties named in the joint caption of the two consolidated proceedings in which the original decree was entered, we gave notice of the application which resulted in the order appealed from to the National Labor Relations Board. The Board appeared and filed what it called a "Response" which appears at pages 62-63 of the record. The "Response" being brief, we reproduce it herewith:

> "Comes now the National Labor Relations Board, by its attorneys, and, for the information of the Court, states its position on the motion made by Amalgamated Utility Workers to punish the Consolidated Edison Company of New York, Inc. and its Affiliated Companies for contempt of court, as follows:
>
> "1. Upon examination of the affidavits filed in support of the motion, the Board suggests that sufficient cause has been shown to warrant an appropriate investigation, pursuant to order of this Court, concerning whether Consolidated Edison Company of New

York, Inc. and its Affiliated Companies have committed acts in violation of the decree of this Court entered March 21, 1938, as modified by the order of this Court entered January 21, 1939.

"2. The Board stands prepared to participate in such investigation as this Court may deem appropriate and herewith offers its services in such capacity as the Court may direct by its order.

"Wherefore, the Board respectfully suggests that the Court make and enter herein an order directing that such investigation be held as the Court may deem appropriate in the premises."

The court will note that the Board considered the papers filed by Petitioner sufficient to require the court below to grant the relief if not controverted or to make inquiry into the correctness of the allegations if challenged. It apparently did not consider itself in duty bound to make further investigation, or to have the power to make such investigation unless specially empowered by the court. This position, we respectfully submit, is strictly in accord with the provisions of the statute.

This has nothing to do with the power of the Board to *move the Court* to action; which, as we have indicated above, is unquestioned as far as a motion to punish for criminal contempt is concerned, although its right to move to punish for a civil contempt may be questioned. But the right to *move* and the right to *investigate*,—that is to say to investigate *both* sides of the question,—are entirely different matters, which counsel for the Respondents seem to have confused. In their brief in opposition to the application for *certiorari*, counsel for the Respondents said:

"Investigation and ascertainment of the facts by the responsible public agency should *precede* resort to the Court with the charge of contempt."

And in a footnote, counsel referred to an address made by Mr. Charles Fahy, the General Counsel of the Board, who signed the "Response" above set out, in which Mr. Fahy

described the investigation which the Board usually institutes before filing a formal complaint, as the kind of investigation that the Board ought to undertake before making a motion to punish for contempt.

We respectfully submit that the learned counsel have confused the different provisions of the National Labor Relations Act; and that if the Board had attempted to do what counsel said was the proper procedure herein, the same counsel would probably be the first to deny the right of the Board to do so. The procedure described by the General Counsel of the Board in the address referred to and quoted from on the last page of the brief of counsel for the Respondents in opposition to *certiorari*, is that which is provided for by Section 11 of the National Labor Relations Act. That section commences as follows:

> *"For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by Section 9 and Section 10 * * *"*

A reference to Sections 9 and 10 will show that there is one kind of hearing and one kind of investigation that the Board is empowered to conduct. Under Section 9(c) the Board may investigate any controversy "concerning the representation of employees," as a preliminary to certification of an exclusive bargaining agency. And by Section 10 the Board is empowered "to prevent any person from engaging in any unfair labor practice affecting commerce, and to conduct a hearing for that purpose." Under the three sections taken together, the Board has the power to conduct any investigation which may be necessary *either to determine* a question of representation, *or to prevent* an unfair labor practice. In the first case the investigation may be either for the purpose of determining by the investigation itself who is entitled to representation, or as a preliminary to the ordering of an election. In the second case the investigation is preliminary to a formal complaint and hearing thereon, so as to determine whether there is any basis for formal complaint and hearing. But a motion to punish for

contempt is neither an investigation nor a hearing to be conducted by the Board. According to counsel's own theory, it is nothing but an application to the court for enforcement of its order. And this Court has, upon the urgent plea of counsel for employers, definitely determined that after the Board has certified the record to the Circuit Court of Appeals,—either upon a petition for enforcement or upon a petition to vacate—the Board has lost all jurisdiction of the matter, and can act thereafter *only in pursuance to an order or direction from the Circuit Court of Appeals.*

Ford Motor Co. v. *N. L. R. B.*, 305 U. S. 364.

Indeed, there never was any question of the fact that the Board could not of its own motion carry on any investigation of,—nor indeed do anything about,—a case after the certified record has been filed in the Circuit Court of Appeals. The Act itself specifically says that after the certified record has been filed in the Circuit Court of Appeals, the jurisdiction of that court shall be *exclusive*.

National Labor Relations Act, Sec. 10(e).

The only question litigated in the *Ford* case was, therefore, whether the Circuit Court of Appeals had power to remand the matter to the Board upon the Board's own application and without the formal reversal of its order. And we can very well imagine the cries of "usurpation" and the appeals to "due process" that would arise if the Board were to attempt to conduct a real investigation into the activities of the Respondents herein in an effort to determine whether or not it ought to move to punish the Respondents for contempt. Of necessity any action by the Board would be limited to the hearing of the only side that it could possibly hear under the circumstances,—namely, the side that would apply to it for action. And that the Board has already done, and has certified that in its opinion the papers submitted by the Petitioner state a *prima facie* case upon which the court ought to act.

Assuming, therefore, that something in the nature of a "certificate of public interest" were necessary under our Act, similar to the determination of "public interest" which is required under the Federal Trade Commission Act, we respectfully submit, that even that formality has been complied with in this case.

This brings us to the problem of policy. Of course, no considerations of policy ought, or could, deprive a person of his right to apply to the courts for a redress of grievances or violation of his rights. But if the question were open, we respectfully submit that it ought to be determined in favor of the right of labor-unions to move to punish for contempt the violators of the decrees of the courts in which their rights have been settled, rather than remit them to the action of the Board,—making the enforcement of their rights dependent upon the vicissitudes which surround the action of the Board. In this connection we respectfully submit for the consideration of the Court the well-known fact,—now a matter of public knowledge and official documentation,—that the National Labor Relations Board is woefully under-staffed and terribly behind time in the determination of matters which are within its exclusive cognizance under the provisions of the National Labor Relations Act. It must also be borne in mind that persons in the position of the Respondents herein have insisted before this Court that where the action of an administrative agency is required by law the function cannot be delegated to subordinates but must be performed by the heads of the agency itself, and this Court has so ruled.

Morgan v. *United States*, 304 U. S. 1.

The kind of investigation described by Mr. Fahy in the address quoted from by counsel for the Respondents on the last page of their brief, on the application for *certiorari*, would certainly not meet those requirements. And there can be no doubt of the fact that if this Court should hold that

a decision by the Board as a public agency is necessary as a preliminary to a motion to punish for contempt, counsel for the Respondents herein would be among the first to insist that the decision must be that of the Board itself. We know that the Board is so overburdened with its present labors that it takes from six months to a year in important cases from the time of the hearing to the time of decision. Under these circumstances, it is practically impossible for the Board to do more work than it does now, and the casting upon it of additional burdens under the ruling appealed from would increase the delay in the original decision of cases by the Board as well as in its attempt to enforce the same by motions for contempt. Indeed, it is quite clear that the sole purpose of the objection on the part of Respondents to the right of Petitioner to move, is the knowledge that if the right to move were to be lodged exclusively in the Board, Respondents would get an indefinite delay in the enforcement of the decree, during all of which time it would not only violate the same but so entrench its position that thereafter it would be utterly impossible to dislodge it. If ever it was true in any case, it is certainly true in this case that—

"Justice Delayed is Justice Denied."

CONCLUSION.

For all of the above reasons, and in order to make the National Labor Relations Act a living force and not a dead letter, the order appealed from should be reversed.

Dated, New York, December 11, 1939.

Respectfully submitted,

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